IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application number 34791/17

NGO KHAM DELCHEVO AND OTHERS

Applicants

v

NORTH MACEDONIA

Respondent State

Third-Party Intervention of the European Roma Rights Centre

1. The European Roma Rights Centre ("the ERRC") is a Roma-led organisation whose vision is for Romani women and men to overcome antigypsyism and its legacy, to achieve dignity, equality, and full respect for their human rights, and to use their experience to contribute to a more just and sustainable world.

A. North Macedonia's border police have systematically targeted Roma leaving the country for extra checks and stopped many from travelling abroad

2. On 2 November 2016, North Macedonia's Interior Minister announced that he was putting a stop to the practice of border police racially profiling Roma and stopping many from leaving the country.[1] The Minister said his decision was based on the large number of cases Romani victims of the practice had taken to the domestic courts. These cases were costing the State money and damaging North Macedonia's reputation. The announcement did not bring an end to the practice entirely. But it did amount to a long-overdue admission of a pattern of racial profiling that had been going on for years. The failure of North Macedonia's civil courts to deal appropriately with the complaints that arose out of this practice mean that now the Court has to deal with many of them. The purpose of this section is to summarise the evidence of this widespread practice of racial profiling. This summary should allow the Court to conclude that what has happened in North Macedonia amounts to a blatant case of institutional antigypsyism; border police overtly and systematically targeted Romani people on the basis of their race, ethnicity, and colour to deprive them of their right to leave the country.
3. Since 19 December 2009, citizens of North Macedonia have been able to travel to the Schengen Zone without a visa, as long as they have a biometric passport. It soon came to our attention that North Macedonia's border police were stopping large numbers of Romani people from leaving the country. Those who were stopped had a

[1] A video of the announcement and a summary can be found in Macedonian at https://mvr.gov.mk/vest/2894.

stamp placed in their passport with two lines struck through it (see the image reproduced below). Roma were told this meant they were prohibited from leaving the country for 24 hours; in practice, people who had this unusual stamp in their passport were almost certain to be stopped from leaving the country again, even if more than one day had passed.

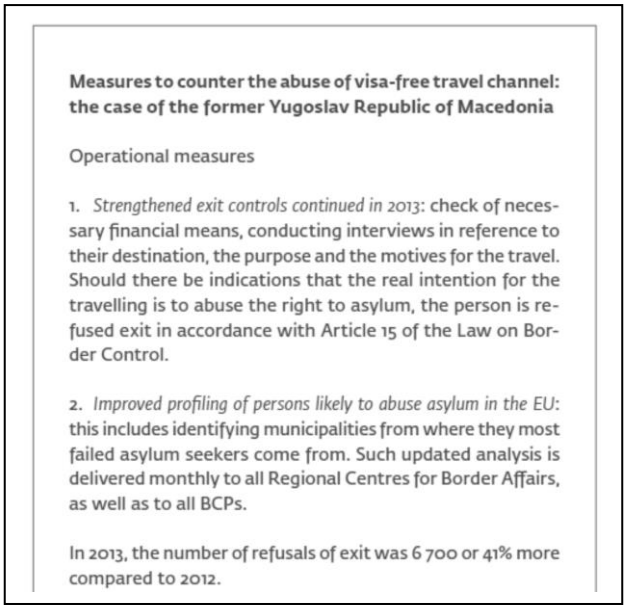
4. We started collecting data. Between 2011 and 2016, we documented 145 cases involving 442 Romani citizens of North Macedonia (322 adults and 120 children) whom border police stopped from leaving the country. In 20 of those cases (14%), the border police explicitly told the people that they were not allowed to leave the country because they were Roma. In 18 of the cases (12%), the Romani people stopped from leaving were not asked anything, but simply prevented from leaving the country. Most others were asked to show that they met the conditions in EU law (the Schengen Borders Code) to travel to the Schengen Zone (e.g. by showing that they had sufficient cash on them), even though there was no basis in domestic law for doing so and other people were not asked to show this. Our data collection was never designed to be exhaustive. Our Skopje-based colleague collected this data; he proactively sought out cases and interviewed the people concerned. There may be many more cases of Roma stopped at the border.
5. The practice seemed so widespread that we were convinced there was a pattern of racial profiling. Seeking more evidence, in December 2013 we designed and carried out a situation-testing exercise to see if border police were racially profiling Romani people. On 5 December 2013, we trained pairs of materially identical Romani and non-Roma testers and on the following three days we observed as they crossed various border points, including land crossings to Serbia and Bulgaria. None of the non-Roma were stopped or questioned at the border; in half the cases, the Romani testers were stopped from leaving. We then supported the Romani testers to bring litigation before the domestic courts. That litigation was successful (see below, § 15).
6. To be clear, not all Roma were stopped from leaving North Macedonia. However, from what we could see, those North Macedonian citizens prevented from leaving the country during this period were almost

PROFILE OF RETURNED ASYLUM SEEKERS

Returned from	Germany
Returned on border crossing point	BCP Airport Alexander the Great
ethnicity	1.Roma; 2.Albanian; 3. Macedonian
age	1.Up to 20; 2. between30-40; 3. between 20-30 years old
gender	male
Vehicle used	1.bus; 2. van
BCP of exit from the Republic of Macedonia	BCP Tabanovce
Hometown	Kumanovo, Bitola, Suto Orizari

exclusively Roma. Border police appeared to be singling out Roma and stopping those who fit a "profile" from leaving the country.

7. We learned of a presentation given by an official of North Macedonia's Ministry of Interior to EU colleagues in Strasbourg on 15 May 2014. A slide from that presentation is reproduced on the previous page.
8. A later slide in the same presentation explicitly states that "*[The p]rofile of people who were not allowed to exit the Republic of Macedonia coincides with the profile of Macedonian citizens who were forcibly returned from the EU countries and with the profiles obtained by exchange of information with the relevant authorities of foreign countries*". In other words, the authorities stopped people from leaving the country if they matched this profile of returned asylum seekers, which means stopping Roma more than people of other ethnicities. This of course relies on a fallacy: the fact that most unsuccessful asylum seekers may be Romani, for example, does not mean that most Roma exiting the country are asylum seekers, or that profiling people based on their ethnicity is lawful; nor does it mean that such profiling is proportionate or effective in reducing asylum applications from North Macedonian citizens. Indeed, those Roma caught up in this practice and who spoke with the ERRC often told us they were travelling to visit family or to go on holiday, and were often travelling not to the EU but to Kosovo, Montenegro, or Serbia.



Measures to counter the abuse of visa-free travel channel: the case of the former Yugoslav Republic of Macedonia

Operational measures

1. *Strengthened exit controls continued in 2013*: check of necessary financial means, conducting interviews in reference to their destination, the purpose and the motives for the travel. Should there be indications that the real intention for the travelling is to abuse the right to asylum, the person is refused exit in accordance with Article 15 of the Law on Border Control.

2. *Improved profiling of persons likely to abuse asylum in the EU*: this includes identifying municipalities from where they most failed asylum seekers come from. Such updated analysis is delivered monthly to all Regional Centres for Border Affairs, as well as to all BCPs.

In 2013, the number of refusals of exit was 6 700 or 41% more compared to 2012.

9. The factual basis for the conclusion that most asylum seekers from North Macedonia were Roma was based on the registration of the mother tongue of asylum seekers in one EU Member State (Sweden).[2] The European Commission also concluded[3] that most of the people from the Western Balkans seeking asylum in Germany were Roma, without explaining how that racially sensitive data was collected. In May 2015, the European Asylum Support Office (an EU agency) reported that "*the ethnic composition of applicants from the former Yugoslav Republic of Macedonia mainly consists of Roma*".[4] Again, there was

[2] European Commission, COM(2013) 836 final, "Fourth Report on the Post-Visa Liberalisation Monitoring for the Western Balkan Countries", 28 November 2013, available at http://europeanmemoranda.cabinetoffice.gov.uk/files/2014/03/17144-131.pdf, page 16.
[3] Id.
[4] EASO, "Asylum Applicants from the Western Balkans: comparative analysis of trends, push-pull factors, and responses – Update", May 2015, available at

no stated basis for this conclusion. Frontex, the EU's external border agency, made clear in February 2014 that the EU supported the North Macedonian border police in the practice of profiling would-be asylum seekers and stopping them. In its "annual risk analysis" report for the Western Balkans, Frontex included the text box reproduced on the previous page. Why would "*identifying municipalities from where they* [sic] *most failed asylum seekers come from* [sic]" help identify potential false asylum seekers? The answer lies in North Macedonia's rampant residential segregation, thanks to which it is often possible to assume a person's ethnicity from her municipality. For example, 90% of the population of Shuto Orizari – the third most common municipality of origin of false asylum seekers according to the Ministry of Interior's profile (see above, § 7 and the slide on page 2) – is Romani.

10. We also learned of a telegram issued by the Ministry of Interior's Bureau for Security Affairs on 28 April 2011 (n°1677) to various police agencies, including the border police. The telegram noted the increase in the number of asylum seekers in the EU from North Macedonia and set out various measures to be taken. These measures included strengthening border controls for those leaving the country, including for "*organised groups of citizens, potential asylum claimants*". In the context set out above, this would clearly have been understood as an instruction to question Romani passengers travelling in a group of two or more, or simply to stop Roma from travelling abroad in groups of whatever size.
11. The Council of Europe Commissioner for Human Rights said it was "clear" that border police in North Macedonia were profiling Romani people.[5] The UN Human Rights Committee,[6] the European Commission Against Racism and Intolerance ("ECRI"),[7] and the Macedonian Ombudsman's Office also confirmed that this widespread discriminatory practice was happening.[8]
12. Yet the European Union hardly reacted to the overwhelming evidence of racial profiling. As mentioned above, EU institutions have spread the notion that asylum seekers from North Macedonia are mostly Romani; the EU has also encouraged the use of profiling at the border to stop would-be asylum seekers from leaving the country. On 10 November 2015, the European Commission, in its "progress report" on North

https://www.easo.europa.eu/sites/default/files/public/Asylum-Applicants-from-the-Western-Balkans_Update_r.pdf, page 13.
[5] CommDH(2013)4, § 101.
[6] CCPR/C/MKD/CO/3.
[7] CRI(2016)21 § 83
[8] Republic of Macedonia Ombudsman, Annual Report 2013, available (in English) at http://ombudsman.mk/upload/Godisni%20izvestai/GI-2013-Ang.pdf, page 66; Annual Report 2014, available (in English) at http://ombudsman.mk/upload/Godisni%20izvestai/GI-2014/GI%202014-Ang.pdf, page 12; Annual Report 2015, available (in English) at http://ombudsman.mk/upload/Godisni%20izvestai/GI-2015/GI%202015-Ang-za%20pecat.pdf, page 82.

Macedonia's proposed accession to the EU,[9] noted that "*Complaints have been registered by Roma prevented from leaving the country*". Yet one year later, the European Commission stated that "*The country should also maintain its efforts to decrease the number of unfounded asylum applications lodged by its nationals in EU Member States*".[10] The message could hardly be clearer: if North Macedonia wants to join the EU, it should continue racially profiling its own citizens at the border.

13. It was around the time the European Commission published that comment (November 2016) that the Interior Minister admitted that there was a discriminatory practice and announced racial profiling would have to stop (see above, § 2). Since the Minister's statement, the number of cases of racial profiling has declined significantly. We have nonetheless continued recording new cases of racial profiling of Roma at the border and supporting the victims to bring cases to the domestic civil courts.

B. Litigation in the Domestic Courts

14. There has been a spate of litigation arising out of what is described above: Roma have brought over 40 cases before civil courts in Bitola, Kochani, Prilep, and Skopje. North Macedonia's domestic courts have dealt with these cases inconsistently. See, mutatis mutandis, *Tudor Tudor v Romania* (2009), §§ 29-30.
15. We mentioned above (§ 5) that we supported the Romani testers in the situation-testing exercise we set up in December 2013 to bring their case to the domestic courts. On 4 April 2017, Skopje Basic Court 2 found in favour of the Romani testers. The first-instance judgment was overturned on appeal and sent back for a re-trial. The case was re-heard in the autumn and on 1 November 2017 Skopje Basic Court 2 delivered a similar, favourable judgment for the plaintiffs. The Skopje Court of Appeal upheld the judgment on appeal on 2 April 2018. The Court may wish to examine this litigation, particularly the final appeal judgment (Skopje Court of Appeal, judgment ГЖ-24/18). It is disappointing that other domestic courts in North Macedonia dealing with cases arising out of similar testing exercises have rejected the testers' discrimination claims.
16. Disappointing, but not surprising. The ERRC supported Romani victims of racial profiling by border police to bring eighteen other cases. The domestic courts' handling of these other cases has been inexplicably inconsistent. The cases focused on two legal claims: that Roma who were stopped from leaving the country were victims of a widespread practice of race discrimination; and that their right to leave the country, protected under the domestic constitution, was violated. Of those eighteen cases, sixteen have led to final judgments in the domestic courts. In eight of those cases, the domestic courts made a finding of discrimination and of a breach of the right to leave

[9] SWD(2015) 212 final, available at https://edz.bib.uni-mannheim.de/edz/pdf/swd/2015/swd-2015-0212-en.pdf.
[10] SWD(2016) 362 final, page 6, https://edz.bib.uni-mannheim.de/edz/pdf/swd/2016/swd-2016-0362-en.pdf.

the country. In four cases, no violation was found on either point. In three cases the domestic courts found a violation of the freedom of movement but did not find that there had been discrimination. In one case the courts found discrimination but no violation of the freedom of movement.

17. The Court is already aware of situations where the very same incident of racial profiling gave rise to multiple legal cases, with different outcomes in the domestic courts. For example, in *Dželadin v North Macedonia* (decision, 2019), North Macedonia's Constitutional Court found no violation. As the Court noted in the statement of facts in that case, published on HUDOC after the case was communicated on 22 September 2017, the applicant's father had successfully brought a claim to the domestic civil courts arising out of precisely the same incident. In his case, the domestic courts found at two levels of jurisdiction that there was an "*instruction that border police officers should 'pay particular attention to Roma' as they had been among those who had most frequently sought asylum*". There was another incident involving fourteen Romani people travelling to Kosovo for a wedding; on 14 March 2014 border police stopped all of them from leaving North Macedonia. This resulted in three separate sets of civil proceedings, brought by different victims of the incident. In one of the cases, Skopje Basic Court 2 found a violation of the right to leave the country and found that there had been discrimination; the Skopje Court of Appeal upheld the judgment. Yet the two other cases were unsuccessful before those very same courts. So now the Court is having to deal with them: *Abazov and others v North Macedonia* (application no.9886/18); *Asanovski v North Macedonia* (application no.19137/18).
18. Even looking at those cases which were factually distinct from each other, it was not the facts that made a difference; the problem is that judges sitting on the same domestic courts in North Macedonia, including courts of appeal, were unable to reach a consistent view of the law. Those judges who did not find a violation of the right to leave the country concluded that the individuals concerned did not meet the conditions under the Schengen Borders Code to enter the Schengen Zone. This was the principal argument put forward by the Ministry of Interior, despite a Constitutional Court ruling of 25 June 2014 (decision no.189/2012) finding (consistently with the Convention – see *Stamose v Bulgaria* (2012), § 36) that safeguarding the immigration laws of foreign countries can never justify restricting someone's right to leave. Those courts which found in favour of the plaintiffs on this point concluded either that there was no reason to single out the plaintiffs for believing they would not be allowed to enter the Schengen Zone, or that the Schengen Borders Code was not part of North Macedonia's domestic legal order, meaning that the Ministry of Interior could not rely on it. This conflict remains unresolved at domestic level. Notably, in Skopje, the same court (Skopje Basic

Court 2) delivered contradictory judgments in different cases, depending on which judge was sitting. The Skopje Court of Appeal upheld those contradictory judgments.

19. The divergent reasoning on the question of discrimination is more troubling still. For example, in one of the cases, the first-instance court did not address the issue of discrimination at all in its judgment, despite it being a core part of the claim. The plaintiff appealed; the appellate court acknowledged that there was discrimination but then inexplicably lowered the amount of compensation. Although domestic law provides for a shift in the burden of proof in discrimination cases, the issue is handled awkwardly in these domestic judgments, with judges sometimes concluding that a prima facie case has not been made or not engaging with the shift of the burden of proof at all. In the nineteen cases we supported (the situation-testing case and the other eighteen cases), the evidence we collected about the widespread nature of the problem was submitted to the domestic courts yet was hardly taken into consideration.

C. What happened in North Macedonia amounted to institutional antigypsyism and NGOs unjustifiably prevented from challenging it enjoy victim status

20. In *Dželadin v North Macedonia* (decision, 2019), a Committee of three judges found that "*[t]he Court has established in a number of cases its practice concerning complaints about the violation of the freedom of movement and the principle of non-discrimination*" (§ 11). Be that as it may, we respectfully submit that the Court has never dealt with a pattern of racial profiling of such a broad scope, involving an instruction to engage in racial profiling and stop so many members of an ethnic minority group from travelling abroad. Such a situation is particularly destructive of fundamental rights and commands the Court's attention. What happened in North Macedonia undermined the confidence Romani people have in the prohibition on discrimination. Romani people's faith in the judiciary and the Convention system is at stake.
21. Roma have a word to describe what is happening when they are racially profiled by their own country's border police and stopped from leaving the country: antigypsyism. It is a word that also describes many other experiences which would be extraordinary in the lives of most Europeans but are all too common among Roma: police brutality; forced eviction; refusal to provide healthcare; housing and school segregation; segregated maternity wards; and many other human rights violations. Roma are targeted and profiled by public officials across Europe and subjected to inferior treatment based on the stereotypes common to antigypsyism.
22. The word antigypsyism is now widely used by intergovernmental bodies to describe the specific forms of discrimination Romani people face. The Committee of Ministers of the Council of Europe used the word eight times in its 2017 recommendation to the member States on improving access to justice for Roma and Travellers in Europe.[11]

[11] CM/Rec(2017)10, adopted on 17 October 2017.

The time has come for the Court to use the term as well. The Alliance Against Antigypsyism, of which the ERRC is a member, defines the concept as follows:

> *Antigypsyism is a historically constructed, persistent complex of customary racism against social groups identified under the stigma 'gypsy' or other related terms, and incorporates:*
> *1. a homogenizing and essentializing perception and description of these groups;*
> *2. the attribution of specific characteristics to them;*
> *3. discriminating social structures and violent practices that emerge against that background, which have a degrading and ostracizing effect and which reproduce structural disadvantages.*[12]

23. According to ECRI, antigypsyism is "*a specific form of racism, an ideology founded on racial superiority, a form of dehumanisation and institutional racism nurtured by historical discrimination, which is expressed, among others, by violence, hate speech, exploitation, stigmatisation and the most blatant kind of discrimination*".[13] This definition includes the term "institutional racism". The term institutional racism was defined, notably, in the United Kingdom in the context of the murder of Stephen Lawrence: "*the collective failure of an organisation to provide an appropriate and professional service to people because of their colour, culture, or ethnic origin*".[14]
24. We urge the Court to describe the situation of racial profiling at the border in North Macedonia using the term "institutional antigypsyism". The evidence set out above is comparable to the evidence that led the Court last year to conclude there was "*institutionalised racism*" in policing in Romania. *Lingurar v Romania* (2019), § 80. Border police in North Macedonia have engaged in a persistent practice of identifying people by their Roma ethnicity, subjecting them to increased scrutiny, and preventing many from leaving the country; in doing so, they were following instructions given by the Ministry of Interior. This practice of discrimination has been aggravated by:
    a. the fact that the practice continued long after various authoritative national and international actors, including the Commissioner for Human Rights, UN bodies, ECRI, and the national Ombudsman, had identified and publicly denounced it;
    b. the failure of the domestic courts in North Macedonia to address the issue consistently and clearly, including by making clear findings of violations of the domestic anti-discrimination law, awarding appropriate damages, and insisting in all cases that the authorities cannot rely on other countries' immigration laws (notably the Schengen Borders Code) to stop people leaving the country;
    c. the failure of the authorities, despite the national and international outcry about this practice, to keep data disaggregated by ethnicity, "*which alone could provide an*

[12] The Alliance's paper, published in June 2016 and updated in June 2017, can be downloaded at www.antigypsyism.eu.
[13] See General Policy Recommendation No.13, CRI(2011)37.
[14] The Stephen Lawrence Inquiry, Report of an inquiry by Sir William MacPherson of Cluny (The MacPherson Report): Chapter 6. February 1999. Available at https://www.gov.uk/government/publications/the-stephen-lawrence-inquiry.

accurate picture of administrative practice and establish the absence of discrimination" (*E.B. v France* (Grand Chamber, 2008), § 74); and

d. the ambivalent approach of the European Union, which acknowledged the existence of discrimination whilst also encouraging North Macedonia's authorities to continue this practice.

25. Furthermore, when the domestic courts prove incapable of dealing with the claims in a manner consistent with the Convention and each other, there is a risk that large numbers of people affected will eventually be forced to take their cases to Strasbourg.

26. A finding that there has been institutional antigypsyism within the border police in North Macedonia has, we submit, the following consequences for the Court's consideration of whether there has been a breach of Protocol no.12:

a. The burden of proof is on the Respondent Government to show that there was no discriminatory practice, including by producing statistical evidence to that effect. See above, § 24.c.

b. The Court is not required to examine the individual cases of applicants who suffered from this discriminatory practice; Romani people stopped at the border during this period and prevented from travelling abroad were victims of a Convention violation. See *D.H. and other v the Czech Republic* (Grand Chamber, 2007), § 209.

c. It is appropriate for the Court to make an indication, in order to assist the Respondent State in complying with its obligations under Article 46 § 1 of the Convention, that general measures must be taken. In this case, these include:

i. a clear, written directive to border police not to engage in racial profiling and not to verify whether people travelling abroad are complying with other countries' immigration laws;

ii. training for border police on discrimination; and

iii. measures to collect data disaggregated by ethnicity (whilst respecting data protection principles) about those prevented from leaving the country.

27. Finally, we urge the Court to conclude that Article 34 read with Protocol no.12 confers victim status on NGOs with an interest in combating discrimination when those NGOs are unjustifiably prevented from making claims of systematic discrimination at domestic level. The principle that NGOs must enjoy certain procedural facilities to support victims of race discrimination is a widely-accepted principle of anti-discrimination law. For example, Article 7 § 2 of the EU's Race Equality Directive (2000/43) states:

> *Member States shall ensure that associations, organisations or other legal entities, which have, in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, may engage, either on behalf or in support of the complainant, with his or her approval, in any judicial and/or administrative procedure provided for the enforcement of obligations under this Directive.*

28. In at least 24 Council of Europe States, NGOs are able to bring claims in their own name.[15] Without this possibility, the protection against discrimination is usually meaningless, particularly for Roma. The Committee of Ministers of the Council of Europe made as much clear when they declared, in October 2017, that "*Roma and Travellers continue to face widespread and enduring anti-Gypsyism, which entails, inter alia, widespread discrimination and other violations of their rights, while at the same time creating barriers which prevent them from accessing justice*".[16]
29. Cases brought by NGOs challenging systemic practices of discrimination may provide the only possibility for discrimination issues to be aired properly at domestic level and to ensure States' compliance with Protocol no.12. In many cases it has been impossible for the Court to establish that there has been discrimination, despite evidence of a widespread pattern of discrimination, because the complaint is so closely tied to the individual circumstances of a particular case. See, e.g., *V.C. v Slovakia* (2011); *A.P. v Slovakia* (2020). When NGOs with an interest in combating discrimination bring cases challenging widespread discriminatory practices, those cases ensure that the full range of issues arising under anti-discrimination legislation are aired at domestic level, with the hope that they will never have to reach the Court. Protocol no.12 compels States to allow NGOs like ours to fulfil our mission in challenging systematic forms of discrimination; this obligation prevents the Court from ending up with large numbers of individual cases arising out of the same systemic practices of discrimination. The Court will face different facts and disparate rulings from the domestic courts and will be hamstrung in its ability to exercise European supervision in the context of widespread discrimination. So Protocol no.12 must be seen as ensuring that NGOs which have an interest in combating discrimination are able to turn to the Court when the domestic courts unjustifiably thwart their attempts to expose widespread practices of discrimination. This is in line with the European consensus on the role of NGOs in enabling Roma and other minorities to combat discrimination; and it fulfils Protocol no.12's promise to expose and remedy discrimination by public authorities.

The European Roma Rights Centre
5 February 2020

[15] European Commission, "A comparative analysis of non-discrimination law in Europe" (2015), available at http://www.equalitylaw.eu/downloads/3824-a-comparative-analysis-of-non-discrimination-law-in-europe-2015-pdf-1-12-mb: "*Actio popularis is permitted by national law for discrimination cases in 19 European countries including Albania, Austria, Bulgaria, Croatia, France, the former Yugoslav Republic of Macedonia, Germany, Hungary, Italy, Liechtenstein, Luxembourg, Montenegro, the Netherlands, Norway, Portugal, Romania, Serbia, Slovakia, Spain. In further four countries Malta, England, Wales and Turkey judicial interpretation is required. In Cyprus, whereas there is no such a law allowing actio popularis claims, the equality body accepts and investigates complaints from organisations acting in the public interest on their own behalf without a specified victim*" (page 89).
[16] See above, note 11.